Supreme Court, U. S.
FILED
OCT 1 1975
MICHAEL RODAK, JR., CLERK

No. 74-489

In the Supreme Court of the United States

OCTOBER TERM, 1975

DEPARTMENT OF THE AIR FORCE, ET AL., PETITIONERS

v.

MICHAEL T. ROSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

ROBERT H. BORK,
Solicitor General,
REX E. LEE,
Assistant Attorney General,
DANIEL M. FRIEDMAN,
Deputy Solicitor General,
LEONARD SCHAITMAN,
PAUL BLANKENSTEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Statement of the Case	2
Summary of Argument	6
Argument:	
I. The Honor and Ethics Code case abstracts are not personnel files	9
II. In any event, exemption 6 of the Freedom of Information Act exempts only documents whose disclosure would involve a clearly unwarranted invasion of personal privacy	12
III. Disclosure of the Honor and Ethics case abstracts with names and identifying references deleted would not involve a clearly unwarranted invasion of personal privacy	17
IV. The Honor and Ethics case abstracts do not relate solely to internal personnel rules and practices	20
Conclusion	27

PAGE

CITATIONS

Cases:

Ackerly v. *Ley*, 420 F.2d 1336 15

Bristol-Myers Co. v. *Federal Trade Commission*, 424 F.2d 935 15

Cuneo v. *Laird*, 338 F. Supp. 504 26
Concord v. *Ambrose*, 333 F. Supp. 958 26
Consumer's Union v. *Veterans Administration*, 301 F. Supp. 796, appeal dismissed as moot 436 F.2d 1363 .. 26

Environmental Protection Agency v. *Mink*, 410 U.S. 73 ..... 5, 23

Getman v. *NLRB*, 450 F.2d 670 12
Grumman Aircraft Engineering Corp. v. *Renegotiation Board*, 425 F.2d 578 15

Hawkes v. *Internal Revenue Service*, 467 F.2d 787 26
Hicks v. *Freeman*, 397 F.2d 193 23

Pifer v. *Laird*, 328 F. Supp. 649 23
Polymers v. *NLRB*, 414 F.2d 999 26

Robles v. *Environmental Protection Agency*, 484 F.2d 843 12
Rural Housing Alliance v. *United States Department of Agriculture*, 498 F.2d 73 ..... 12, 15

Soucie v. *David*, 448 F.2d 1067 15

PAGE

Tietz v. *Richardson*, 342 F. Supp. 610 26

Vaughn v. *Rosen*, 484 F.2d 820 15

Statutes and Regulations:

Freedom of Information Act, 5 U.S.C. 552:
Section 552(a) 11
Section 552(a)(2) 18
Section 552(b)(2) 1, 4, 5, 8, 20, 22, 23, 25, 26
Section 552(b)(6) 1, 3, 4, 5, 7, 9, 11, 12, 15, 17

Freedom of Information Act, Amendments of 1974, Pub. L. 93-502, 88 Stat. 1561, *et seq.*: 15
Section (a) 16
Section (a)(2) 18
Section (b) 15
Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, *et seq.* 11
5 U.S.C. 1002 23
32 C.F.R. Part 806 ..... 9, 19

Miscellaneous:

ABA Opinions on Professional Ethics 9

103 Cong. Rec. 7492 (1957) 23
107 Cong. Rec. 5604 (1961) 23
120 Cong. Rec. S9313 (1974) 16
120 Cong. Rec. S9315 (1974) 16, 17

PAGE

Cumulative Bulletin of the Internal Revenue Service .. 9

Hearing Before a Subcommittee of the House Committee on Government Operations, 84th Cong., 1st Sess. (1955) 23

Hearing Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. (1963) 23

Hearing Before a Subcommittee of the House Committee on Government Operations on H.R. 5012, *et al.*, 89th Cong., 1st Sess. (1965) 23

H. R. Rep. No. 1497, 89th Cong. 2nd Sess. (1966) 13, 22, 26

S. Rep. No. 813, 89th Cong. 1st Sess. (1965) 14, 22, 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-489

DEPARTMENT OF THE AIR FORCE, *et al.*,

Petitioners,

—v.—

MICHAEL T. ROSE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Questions Presented

1. Whether exemption 6 of the Freedom of Information Act (the "FOIA"), relating to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," automatically exempts from disclosure, without *in camera* inspection, abstracts of Honor and Ethics Code cases, with names and identifying references deleted, which have been adjudicated by, and internally disseminated within, the United States Air Force Academy?

2. Whether exemption 2 of the FOIA, exempting from disclosure matters related "solely to internal agency per-

sonnel rules and practices" applies to the Air Force Academy's Honor and Ethics Code case abstracts reflecting the results of its disciplinary system, publicly claimed by the Air Force to be a significant aspect of the training of future Air Force officers?

Statement of the Case

In a proceeding brought pursuant to the FOIA, Respondents, who are members or former members of the New York University *Law Review*, have sought access to official Air Force records collected and maintained by the United States Air Force Academy. The records relate to the operation of the Academy's disciplinary system and are sought for use in connection with a study conducted under the auspices of the *Law Review* of disciplinary practices and procedures at the five service academies. (App. 173, 188-192)

The documents at issue are case abstracts of Honor and Ethics Code adjudications assembled and maintained in the Academy's Honor and Ethics Code reading files, with personal references or other identifying information deleted. The Respondents themselves have requested the deletion of identifying references, notwithstanding the fact that the abstracts are posted at forty different locations at the Academy in an unedited form which includes the names of individuals found to have violated the Honor or Ethics Codes and, in that form, are available for inspection by, and discussion among, Academy cadets, faculty and administration (App. 2-3, 18, 109-110, 164, 189).

The Academy Honor Code provides that "[w]e will not lie, steal, cheat, nor tolerate among us anyone who does."

The sanitized case abstracts reflect the substantive content of the Honor Code's injunctions against "lying," "cheating," "stealing" or "tolerating." This content has developed over the life of the Code through the case-by-case adjudication of Code violations; no other source for this information exists. Respondents have emphasized in administrative proceedings and in the courts below that they have no interest in ascertaining the identity of any cadet involved in disciplinary proceedings and that the redacted summaries have been sought solely for the purpose of analyzing the Code's substantive content (App. 2-3, 18-19, 47, 57).

Acting pursuant to Air Force Regulations requiring specification of the exemption relied upon as the ground for non-disclosure (App. 129), the Air Force refused disclosure of the abstracts on the grounds that they were covered by exemption 6 of the FOIA and by Air Force Regulations 4(f) and 4(g)(1)(b) (App. 21, 121-122).

The District Court, adjudicating the case on cross-motions for summary judgment rejected exemption 6 as a basis for non-disclosure.[1] The court held that disclosure of the summaries, if subsequently edited to preserve anonymity, would not constitute a clearly unwarranted invasion of personal privacy within the meaning of exemption 6, stating:

> "Revelation of a set of facts absent some type of association with a person's name seems to us incapable of invading anyone's personal privacy. It is only the

[1] The parties cross-moved for summary judgment, but the plaintiffs also requested *in camera* review (Pet. App. C, p. 26A, Pet. App. A, p. 14A).

identifying connection to the individual that casts personnel, medical and similar files within the protection of the sixth exemption. The Act and courts following the Act, therefore, permit deletions of exempted portions of documents but then order the remainder released" (Pet. App. C, pp. 30A-31A).

The District Court also rejected the Air Force's contention that even the disclosure of edited case summaries would involve a clearly unwarranted invasion of personal privacy because the edited summaries might provide information permitting the correlation of a Code violation with a particular cadet. The court stated:

> "While it is possible that a reader, in conjunction with facts learned long since cadet days, might successfully conjecture about an identity if he had not learned it when he was at the Academy, no one can be harmed. This hypothetical reader, necessarily once a cadet, has subscribed to the nature and workings of the Honor Code. . . . Even if 'society' deems case summaries to be of a quasi-criminal nature, no stigma could attach to a former cadet because no one outside the cadet/former cadet universe could possibly connect a name with a case" (Pet. App. C, pp. 31A-32A).

Having concluded that exemption 6, the only exemption relied upon by Petitioners, would not be applicable if appropriate deletions were made, the District Court nevertheless refused *sua sponte* to order disclosure, on the assumption, not argued by the government, that the documents "related solely to the internal personnel rules and practices of an agency" and were therefore exempt under 5 U.S.C. §552 (b)(2) (Pet. App. C, pp. 33A-35A).

The Court of Appeals reversed. It held that the withholding of the case summaries, if edited to preserve anonymity, could not be justified by exemption 2 (Pet. App. A, p. 8A). The court concluded that the case summaries do not relate solely to internal personnel rules and practices, in view of extensive public interest and discussion about the Codes and about disciplinary matters at the Academy—interest and discussion generated and encouraged by the Academy. The court also stated:

> "Of course, even without such official encouragement, there would be interest in the treatment of cadets, whose education is publicly financed and who furnish a good portion of the country's future military leadership. Indeed, all sectors of our society, including the cadets themselves, have a stake in the fairness of any system that leads, in many instances, to the forced resignation of some cadets. The very study involved in this case bears additional witness to the degree of professional and academic interest in the Academy's student-run system of discipline" (Pet. App. A, p. 8A).

With respect to exemption 6, the Court of Appeals did not determine whether the case summaries constituted "personnel" or "similar" files (Pet. App. C, p. 10A). The court also declined to determine whether disclosure of the redacted case summaries or any portion of them was proscribed by exemption 6 (Pet. App. A, p. 13A). Instead, relying on this Court's decision in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 93 (1973), the court held that Petitioners had not carried their burden of proving that the summaries came within this exemption and remanded the case with instructions that the District Court conduct an *in camera* inspection of the summaries to deter-

mine whether personal, identifying references could be successfully deleted, considering the *in camera* procedure "a workable compromise between individual rights 'and the preservation of public rights to governmental information'" (Pet. App. A, p. 15A). If such deletions could be successfully accomplished, the summaries would be disclosed. If, on the other hand, identifying personal references could not be deleted, then to that extent disclosure would not be required (Pet. App. A, pp. 14A-15A).

The *in camera* inspection ordered by the Court of Appeals has not occurred, since the court has stayed its mandate pending disposition of the Petition for Certiorari.

Summary of Argument

1. The Honor and Ethics case abstracts are not personnel files. They are summarizations of cases adjudicated by the Academy's Honor and Ethics Committees and internally disseminated at the Academy for *stare decisis* and pedagogical purposes. Petitioners' argument that the case abstracts are personnel files was not made to the courts below and is contradicted by their own Regulations. Air Force Regulations implementing the Freedom of Information Act distinguish between "personnel and medical files" and "files similar to personnel and medical files" and include in the latter category documents relating to disciplinary action, such as the case abstracts. In contrast to the case abstracts which are posted at forty different locations throughout the Academy, personnel files, as the term is commonly used, are not subject to wide intra-agency disclosure and distribution. Typically, an employee

would not have complete access even to his own personnel file and it would be extremely unusual for other employees to have access to personnel files of fellow employees.

2. The legislative history of exemption 6 indicates that Congress intended to permit the disclosure of information that might be contained in medical or personnel files as well as similar files if no clearly unwarranted invasion of personal privacy would occur. Congress did not intend a *per se* exemption for medical and personnel files, recognizing that files labeled "medical" or "personnel" might contain non-confidential information which could be publicly disclosed with no clearly unwarranted invasion of personal privacy. A recent amendment to the FOIA specifically provides that segregable portions of records be disclosed after the deletion of exempt portions of such records. The legislative history of that amendment indicates that Congress intended to endorse FOIA decisions requiring the disclosure of non-confidential portions of confidential documents or files and intended to extend the segregation principle to all exemptions to the FOIA's disclosure provisions.

3. Disclosure of the redacted case abstracts will not involve a clearly unwarranted invasion of personal privacy. As Respondents have requested and as the Court of Appeals has directed, names and all identifying references are to be deleted from the abstracts prior to disclosure. Such deletions will be made by Petitioners in the context of continuing judicial supervision. Once the deletions are made, no clearly unwarranted invasion of personal privacy will result from disclosure of anonymous, sanitized summaries of past disciplinary adjudications.

4. The Court of Appeals recognized that because discipline at the Academy, as it affects the training of future Air Force officers, had such important implications for the general public, the case abstracts could not be understood to relate solely to the Academy's internal personnel rules and practices within the meaning of exemption 2. This conclusion is particularly appropriate since the Academy, not the Court of Appeals, originated the concept that the public has an important stake in Academy disciplinary matters. The legislative history of exemption 2 indicates that it was intended to exempt from disclosure documents relating only to routine internal personnel matters such as parking facilities and lunch hours—documents concerning which the administrative burden of assembling and retaining for public inspection would outweigh any reasonably foreseeable benefits from their disclosure. The legislative background of exemption 2 indicates that Congress contemplated that the exemption would apply only to a narrow category of routine internal personnel documents, but not to all matters concerning the internal management of a government agency.

ARGUMENT

I.

The Honor and Ethics Code case abstracts are not personnel files.

Contrary to Petitioners' submission, the Honor and Ethics case abstracts are not personnel files within the meaning of exemption 6 and, if covered at all by exemption 6, are "similar files." The abstracts are not verbatim transcripts of proceedings before the Cadet Honor Committee. Rather, in the words of Colonel M. E. Kinevan, the Academy Staff Judge Advocate, they are "brief, one-page summarizations of each case" disseminated at the Academy for purposes "related to training and administration"[2] (App. 164).

Air Force Regulations sharply distinguish between "personnel and medical files," 32 C.F.R. 806.5(f), and "files similar to medical and personnel files." 32 C.F.R. 806.5(g). The Regulations unambiguously define "similar files" to include documents like Honor and Ethics Code case abstracts. According to the Regulations, "examples of similar files are those: containing reports, records, and other material pertaining to personnel matters in which administrative action, including *disciplinary action,* may be taken or has been taken" 32 C.F.R. 806.5(g)(1)(ii) (emphasis supplied) (App. 121-122).

Ignoring their own Regulations, Petitioners maintain that the case abstracts are personnel files on the grounds that

---

[2] The Court of Appeals observed that "[t]he practice of furnishing abstracts of cases, while preserving anonymity, is not unknown to the law" citing Revenue Rulings collected in Cum. Bull. of the IRS and ABA Opinions on Professional Ethics (1967) (Pet. App. A, p. 14A, n. 18).

the summaries "relate to conduct by the cadets at the Academy, and are the basis for *disciplinary action* such as involuntary resignation or expulsion" (p. 10, Petitioners' brief) (emphasis supplied). The argument that the abstracts are personnel files is directly inconsistent with Air Force Regulations but would fail even if the Regulations had not clearly resolved the question. Documents may relate to employee conduct or to disciplinary matters without becoming "personnel files." If a relationship with conduct or with disciplinary matters were sufficient to transform documents into personnel files, totally insulated from even limited, judicially supervised disclosure, then the legislative compromise struck in exemption 6 between rights of individual privacy and public access to the non-confidential portions of files that might have been arbitrarily labeled "personnel files," would be eviscerated. (See pp. 13-14, *infra*.)

Common practice and definition also compel the conclusion that the abstracts are not personnel files. "Personnel files," as the term is commonly used, pertains to the files maintained by the personnel department of an agency or employer. These files contain documents such as an employee's employment application, references from previous employers, attendance record, the results of civil service examinations, medical history and supervisory evaluations of work performance. Traditionally, access to personnel files is strictly limited to members of the personnel department and to supervisory personnel directly involved with the particular employee. In most instances, an employee does not have access to his own personnel files and it would be highly unusual for employees to have access to the personnel files of their fellow employees.

It would, we submit, be extraordinary for "personnel files" or confidential documents from such files to be posted

on bulletin boards, or disseminated to other employees for didactic purposes or because of general intra-agency administrative considerations. When documents like the Honor and Ethics case abstracts are afforded such treatment, they cannot reasonably be considered "personnel files" under exemption 6.[3]

The courts below did not make a factual finding that the case abstracts are personnel files, automatically exempt from disclosure, because, among other reasons, the distinction between "personnel" and "similar" files pressed here by Petitioners was not advanced by them below. Nor did the courts below find the categorization of files as "medical," "personnel" or "similar" to be critical to the resolution of this case. The District Court held that regardless of whether the abstracts are "medical," "personnel" or "similar" files, their disclosure would not involve a clearly unwarranted invasion of personal privacy (Pet. App. A, pp. 31A-33A). The Court of Appeals, describing the documents as "personnel" or "similar" files, remanded the case to permit the District Court to determine whether the deletions of identifying references could be effected (Pet. App. A, pp. 10A, 14A).

In short, even if judicial inquiry were more limited in the case of "personnel" files than "similar" files, Air Force Regulations, the courts below and common practice and definition all support the conclusion that the case abstracts are similar files and not personnel files.

---

[3] The millions of personnel and medical files maintained by agencies such as the Civil Service Commission, the Veterans Administration and the Selective Service System to which petitioners would analogize the Honor and Ethics case abstracts are not files that are made generally available to agency employees and are not, in any event, similar to the case abstracts. Furthermore, personnel files, such as those referred to by petitioners, are expressly protected by the Privacy Act of 1974 (P.L. 93-579, 88 Stat. 1896, 5 U.S.C. §552(a)).

II.

In any event, exemption 6 of the Freedom of Information Act exempts only documents whose disclosure would involve a clearly unwarranted invasion of personal privacy.

Exemption 6 permits nondisclosure of "personnel and medical files and similar files the disclosure of which would involve a clearly unwarranted invasion of personal privacy." The courts which have interpreted this exemption have properly concluded that if no clearly unwarranted invasion of privacy would result from the disclosure of documents, no good reason would exist for their nondisclosure regardless of whether such documents might have originally been contained in a "personnel," "medical" or "similar" file. See, e.g., *Rural Housing Alliance* v. *United States Department of Agriculture,* 498 F.2d 73, 77 (D.C. Cir. 1974); *Robles* v. *Environmental Protection Agency,* 484 F.2d 843, 845 (4th Cir. 1973); *Getman* v. *NLRB,* 450 F.2d 670, 674 (D.C. Cir. 1971).

The legislative history of exemption 6 indicates that Congress was concerned with the protection of confidential information of the type frequently contained in personnel or medical files and sometimes contained in similar files. That history indicates that Congress did not intend a *per se* exemption for personnel files or for medical files, but, on the contrary, suggests that Congress recognized that even files clearly denoted "personnel" or "medical" files (which the case abstracts are not) might contain non-confidential information of value and interest to the public which could be disclosed without causing a clearly unwarranted invasion of personal privacy.

The House Report states:

> "6. Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy: Such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, and Bureau of Prisons have great quantities of files containing intimate details about millions of citizens. Confidentiality of these records has been maintained by agency regulation but without statutory authority. A general exemption for the category of information is much more practical than separate statutes protecting each type of personal record. The limitation of a "clearly unwarranted invasion of personal privacy" provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual. The exemption is also intended to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or the compilation of unidentified statistical information from personal records" (H.R. Rep. No. 1497, 89th Cong. 2nd Sess. p. 11).

In similar language, the Senate Report states:

> "Exemption No. 6 contains an exemption for 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.' Such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, etc., have great

quantities of files, the confidentiality of which has been maintained by agency rule but without statutory authority. There is a consensus that these files should not be opened to the public, and the committee decided upon a general exemption rather than a number of specific statutory authorizations for various agencies. It is believed that the scope of the exemption is held within bounds by the use of the limitation of 'a clearly unwarranted invasion of personal privacy.'

"The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information. The application of this policy should lend itself particularly to those Government agencies where persons are required to submit vast amounts of personal data usually for limited purposes. For example, health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public" (S. Rep. No. 813, 89th Cong. 1st Sess. p. 9).

Under the *per se* approach to medical and personnel files proposed by Petitioners, non-confidential information located in files labeled "personnel" or "medical" files would be insulated from disclosure. Moreover, the propriety of the initial decision to insert such information—or any information—in a "personnel" or "medical" file would be effectively insulated from judicial scrutiny. This *per se* approach would inject into the FOIA serious obstacles to public access to information in the hands of the govern-

ment—obstacles not intended by Congress which would weaken the Act. As one court pointed out in discussing the application of exemption 6 to medical files:

> "Where a purely medical file is withheld under the authority of Exemption 6, it will be for the District Court ultimately to determine any dispute as to whether that exemption was properly invoked. It will obviously not be enough for the agency to assert simply that it received the file under a pledge of confidentiality to the one who supplied it. Undertakings of that nature cannot, in and of themselves, override the Act."

Ackerly v. *Ley,* 420 F.2d 1336, 1339-40 n. 3 (D.C. Cir. 1969). See also *Rural Housing Alliance* v. *United States Department of Agriculture,* 498 F.2d at 77.

The release of edited files is now required by the 1974 Amendments to the FOIA (Pub. L. 93-502, 88 Stat. 1561, 1562, 1564). 5 U.S.C. §552(b), as amended, provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." The legislative history of this amendment indicates that Congress intended to endorse prior judicial decisions requiring the disclosure of nonexempt portions of otherwise exempt files or documents. See, *e.g., Vaughn* v. *Rosen,* 484 F.2d 820, 825 (D.C. Cir. 1974) *cert. den.* 415 U.S. 1136; *Soucie* v. *David,* 448 F.2d 1067, 1079-80 (D.C. Cir. 1971); *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board,* 425 F.2d 578, 580-81 (D.C. Cir. 1970); *Bristol-Myers Co.* v. *Federal Trade Commission,* 424 F.2d 935, 938-39 (D.C. Cir. 1970).

As Senator Kennedy, a principal sponsor of the amendments, stated concerning the segregable records provision:

"S. 2543 adds a new provision to the Act stating that if exempt portions of requested records or files are severable, they should be severed—or deleted, as the case may be—and the nonexempt portions disclosed. Many courts are requiring this now, and the bill emphasizes the desirability of this approach in providing specifically that courts may order disclosure of 'portions' of files or records as well as entire files or records." (120 Cong. Rec. S. 9313 (daily ed.) May 30, 1974.)

The segregable records provision is also closely related to the amendment specifically authorizing *in camera* inspection of documents claimed to be exempt (5 U.S.C. §552(a)(4)(B)(i)). This relationship was explained as follows by Senator Kennedy:

"Taken together these provisions are intended to require agencies, and courts, to look at the information requested—not the title of the document or a restricted-access stamp or the fact that the record is in a file marked 'Confidential' or 'Investigation'—to determine whether the information should be released under the Freedom of Information Act" (*Id.* at S. 9315).

As applied to cases involving claims based on exemption 6, the legislative history of the 1974 amendments underscores the validity of the conclusion reached by the courts below in this case. Senator Kennedy continued:

"For example, deletion of names and identifying characteristics of individuals would in some cases serve the underlying purpose of exemption 6, which exempts 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy'" (*Id.*).[4]

III.

Disclosure of the Honor and Ethics case abstracts with names and identifying references deleted would not involve a clearly unwarranted invasion of personal privacy.

Exemption 6 does not preclude disclosure of the Honor and Ethics case abstracts unless a clearly unwarranted invasion of personal privacy would result. Respondents have requested access to the Honor and Ethics case ab-

[4] The mechanics of *in camera* review and judicial editing of partially exempt material were further described as follows by Senator Kennedy:

"With the new provisions it should be clear that there can be no blanket claim of confidentiality under any of the exemptions. In connection with this objective, S. 2543 proposes specifically to reaffirm the discretion of the courts through in camera inspection to examine each and every element of requested files or records. The Senate report in this respect cites with approval the type of procedure set out in the District of Columbia Court of Appeals in the case of Vaughn v. Rosen, requiring the Government to sustain its burden of justifying its withholding of each element of a contested file or record. That procedure is consistent with our intent that only parts of records which are specifically exempt may be withheld from public disclosure. This should result in maximum possible disclosure and is consistent with the original congressional purpose in enacting the Freedom of Information Act.

"This new requirement is also consistent with most judicial pronouncements in Freedom of Information Act cases, although unfortunately some courts are not adhering to the principle under some exemptions. The new language in S. 2543 should extend this deletion principle to all cases, involving all exemptions" (120 Cong. Rec. S. 9315 (daily ed.) May 30, 1974).

stracts with names and all identifying references deleted, and submit that once such deletions are made, no "clearly unwarranted" invasion of the privacy of any cadet or former cadet would occur.

The court below correctly observed that Petitioners bear the burden of proving that disclosure of the edited abstracts would involve a "clearly unwarranted invasion of personal privacy," but "having failed to carry that burden of justification under Exemption Six in the trial court by means of affidavits or testimony, the Agency must now produce the summaries themselves in court . . . and cooperate with the Judge in redacting the records so as to delete personal references and all other identifying information" (Pet. App. A, p. 14A).

In camera inspection by the District Court will insure that the editing process is successful and that no invasion of personal privacy will occur.[5] On the other hand, the Court of Appeals noted that if, contrary to its tentative conclusion, the District Court is unable to delete identifying references, then to the extent such deletions cannot be made, the abstracts need not be disclosed. Under these procedures personal privacy will not be compromised since the redaction process will proceed under Academy and judicial supervision and, at the conclusion of that process, continuing appellate review will be available with re-

[5] In addition to the FOIA provisions, discussed above, permitting *in camera* review and the release of segregable portions of documents, subsection (a)(2) of the FOIA (5 U.S.C. §552(a)(2)), requiring, *inter alia*, publication of final opinions, statements of policy and administrative staff manuals, provides for agency deletion of identifying details "[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy."

spect to any of the edited abstracts that may be ordered to be disclosed by the District Court. Such review, moreover, would be conducted with the benefit of a full factual record. At this point no court has inspected the documents claimed to be exempt from disclosure.

Once names and identifying references are deleted from the abstracts there are several practical reasons why disclosure would not result in a clearly unwarranted invasion of personal privacy. First, it would be impossible for any reader of an edited case abstract who was not previously familiar with a particular Honor or Ethics Code case to identify an individual from an anonymous version of the facts of a case. Second, only those individuals who had knowledge of the case derived from sources other than the edited abstracts would be able to make such a connection, but the number of such individuals would be small and, in any event, would be comprised solely of persons to whom the summaries would provide no new information. Third, whatever possibility there is that former cadet offenders may be identified would not be attributable to the disclosure of the edited summaries, but, instead, would result from the Academy's own practice of internally publishing summaries of cases for purposes related to cadet training and administration without deleting the names of the cadets involved.[6] By comparison with this practice, the use of anonymous

[6] Air Force Regulations provide that in determining whether public disclosure of documents would involve a clearly unwarranted invasion of personal privacy, among the factors to be considered is ". . . the degree to which an individual's privacy had already been violated." The Regulations further provide that "[t]he release of information concerning alleged misconduct that . . . has already been exposed to the public is less likely to constitute a clearly unwarranted invasion of personal privacy" (App. 122). See 32 C.F.R. §806.5(g)(2).

abstracts for scholarly purposes does not involve a clearly unwarranted invasion of personal privacy.[7]

As the Court of Appeals noted, "despite the continuing injunction of secrecy, no one can guarantee that all those who are 'in the know' will hold their tongues, particularly years later when time may have eroded the fabric of cadet loyalty" (Pet. App. A, p. 12A). Former cadets have a right to speak about disciplinary episodes that occurred at the Academy—a right unaffected by whether or not they read anonymous case summaries. To the extent that such discussions occur among former cadets and concern matters which they might have previously agreed not to discuss, the responsibility, as the Court of Appeals indicated, lies with "the eroded . . . fabric of cadet loyalty" (Pet. App. A, p. 12A), not with the disclosure of anonymous case abstracts. In any event, speculation that such discussions might occur does not demonstrate the existence of a clearly unwarranted invasion of personal privacy within the meaning of exemption 6.

IV.

The Honor and Ethics case abstracts do not relate solely to internal personnel rules and practices.

Petitioners also claim that the case summaries fall within exemption 2, pertaining to matters "related solely to the internal personnel rules and practices of an agency." The

[7] Honor Code case abstracts are maintained in forty locations throughout the Academy to be made available to the student body, the faculty and certain of the staff. In addition, certain of the cadets who left the Academy after having been found to have violated the Honor Code have consented to have their case summaries distributed to educational institutions for instructional purposes (App. 17, 109-110).

Court of Appeals rejected this claim, recognizing that the administration of discipline at the Academy had such important implications for the general public that the case abstracts could not be understood to relate solely to the Academy's internal personnel rules and practices. As the Court pointed out, "all sectors of our society, including the cadets themselves, have a stake in the fairness of any system that leads, in many instances, to the forced resignation of some cadets" (Pet. App. A, p. 8A).

The concept of the public's stake in the operation of the Honor Code as it affects the training of future Air Force officers originated with the Air Force Academy, not the Court of Appeals. Since the Air Force publicly proclaims the educational merit of the Academy's student administered disciplinary Code (App. 204) it should not be permitted to refuse disclosure of information essential to understanding the Code's operation.

On November 10, 1972, a White House press release noted that the President had received a report dated April 19, 1972 from the Academy's Board of Visitors. Among the recommendations made to the President by the Board and publicly announced by the White House was "that the Academy be encouraged to take steps to publicize the positive features of the role of the Honor Code in the daily activities of Cadets" (App. 200-201). Earlier, in January 1972, Lieutenant General Albert B. Clark, Superintendent of the Academy, conducted a public press conference concerning the Honor Code and disciplinary problems at the Academy (App. 204-222) and acknowledged to the press that:

> "Your interest and that indeed of the entire nation on the incident which I reported today is of course under-

> standable, the nation is entitled to the highest standard of integrity from among those young men who are here at the Academy training to positions of great trust in your Air Force in the days ahead"[8] (App. 204).

The Court of Appeals' conclusion that exemption 2 does not relate to documents concerning which there is a genuine and significant public interest is consistent with, and indeed required by, the exemption's legislative history. The Senate Report states:

> "Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave and the like" (S. Rep. No. 813, *supra* at 8).

Similarly, the House Report indicates that exemption 2 does *not* cover "matters of internal management such as employee relations and working conditions and routine administrative procedures . . ." (House Rep. 1497, *supra* at 10).

The Senate Report indicates that exemption 2 was intended to eliminate the burden of assembling and maintaining for public inspection and dissemination internal documents in which the public could not reasonably be expected to have an interest. In enacting exemption 2 Congress concluded that the administrative difficulties of publishing such materials would outweigh any reasonably foreseeable bene-

[8] In addition to General Clark, other Academy officials have publicly discussed the Honor Code and the Honor System with the press (App. 217-222).

fits from disclosure. Cf. *Hicks* v. *Freeman,* 397 F.2d 193 (4th Cir. 1968); *Pifer* v. *Laird,* 328 F. Supp. 649 (N.D. Cal. 1971). The case abstracts are not documents with merely internal significance; they do not pertain to routine matters; nor is any particular administrative burden associated with their disclosure (Pet. App. A, p. 15A n. 21).

The legislative background in which exemption 2 was adopted confirms that the exemption was not intended to apply to matters of internal agency management, but to a considerably narrower category of internal matters relating to routine internal personnel considerations.

The FOIA was enacted to replace section 3 of the Administrative Procedure Act, 5 U.S.C. §1002 (1964) (hereafter the "APA") which had been criticized as a withholding rather than a disclosure statute. See *Environmental Protection Agency* v. *Mink,* 410 U.S. 73 (1973). A basic focus of the criticism was the APA's provision exempting from disclosure "any matter relating solely to the internal management of any agency."[9]

The first FOI bill to be seriously considered by the Senate, S. 1666, was divided into three sections, each with a

[9] This clause was vigorously criticized throughout the eleven years during which Congress considered freedom of information legislation. *E.g.,* Hearings Before a Subcomm. of the House Comm. on Government Operations on the Availability of Information From Federal Departments and Agencies (Part 1), 84th Cong., 1st Sess. 11, 12 (1955); 103 Cong. Rec. 7492 (1957) (statement of Senator Hennings introducing S. 2148. 85th Cong., 1st Sess.); 107 Cong. Rec. 5604-05 (1961) (statement of Senator Carroll introducing S. 1567, 87th Cong., 1st Sess.); Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary on S. 1666 and S. 1663 (in part), 88th Cong., 1st Sess. 10, 48, 56, 61 (1963); Hearings Before a Subcomm. of the House Comm. on Government Operations on H.R. 5012, *et al.* (Part 1), 89th Cong., 1st Sess. 29-30, 141, 162 (1965).

self-contained set of exemptions. The first section relied on the language of the APA to exempt from required publication in the Federal Register "any matter relating solely to the internal management of an agency." However, the second and third sections, relating to agency orders and records, respectively, exempted only information which "relates solely to the internal personnel rules and practices of any agency." The Senate Committee report on S. 1666 drew a sharp distinction between the "more tightly drawn" exempting language in the second and third sections and the internal management clause in the first section. (*Id.* at 12, 13.) S. 1666 was passed by the Senate in 1964, but the House took no action that year.

The distinction between "internal management" and "internal personnel rules and practices" was carried over to the FOI bills introduced in the 89th Congress. The bill which was introduced in the Senate in 1965 and which became law in 1966 was different from S. 1666 in that all the exemptions were consolidated into a single subsection, and the exemption for "internal management" matters was dropped (S. 1160, 89th Cong., 1st Sess.).

This legislative background indicates that Congress intended the FOIA's exemption for "internal personnel rules and practices" to be narrower than the APA's exemption for "internal management," and, as the Senate Report reflects, to relate only to routine matters such as "personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like." S. Rep. No. 813, *supra* at 8.

The House Report, upon which the Air Force's own internal personnel rules exemption is patterned,[10] permits the nondisclosure of a somewhat broader (but different) category of documents than does the Senate Report. Under the House formulation, however, there is even less basis for concluding that the Honor and Ethics case abstracts relate solely to internal personnel rules and practices. The House Report on exemption 2 states:

> "2. Matters related solely to the internal personnel rules and practices of any agency: Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure, but this exemption would not cover all 'matters of internal management' such as employee rela-

[10] The Department of the Air Force Regulations implementing the Freedom of Information Act provide that documents in the possession of the Air Force which are not exempt under section 4 of the Regulations be made available upon request to any person, A.F.R. 12-30(3)(a) (App. 116).

Section (4)(b) of the Regulations, the only provision which relates to internal personnel rules and practices, exempts from disclosure the following documents:

> "Those containing rules, regulations, orders, manuals, directives, and instructions relating to the internal personnel rules or internal practices of the Air Force. Examples include:
>
> (1) Operating rules, guidelines, and manuals for Air Force investigators, inspectors, auditors, or examiners that cannot be disclosed to the public without substantial prejudice to the effective performance of a significant Air Force function. Some of these materials might reveal:
>
> (a) Negotiation and bargaining techniques
>
> (b) Bargaining limitations and positions
>
> (c) Inspection schedules and methods
>
> (d) Audit schedules and methods.
>
> (2) Personnel and other administrative matters, such as examination questions and answers used in training courses or in determining the qualification of candidates for employment, entrance to duty, advancement, or promotion" (App. 118).

tions and working conditions and routine administrative procedures which are withheld under the present law" (House Rep. No. 1497, *supra,* at 10).

Cases relying on the House's interpretation of exemption 2 have emphasized that its purpose is to prevent the circumvention of agency regulations that would occur if the procedural manuals and guidelines upon which the agency relied were disclosed to those who were the subjects of regulation. *Polymers* v. *NLRB,* 414 F.2d 999 (2nd Cir. 1969); *Cuneo* v. *Laird,* 338 F. Supp. 504 (D.D.C. 1972); see also *Tietze* v. *Richardson,* 342 F. Supp. 610 (S.D. Tex. 1972); *Concord* v. *Ambrose,* 333 F. Supp. 958 (N.D. Cal. 1971); *Hawkes* v. *Internal Revenue Service,* 467 F.2d 787 (6th Cir. 1972); *Consumer's Union* v. *Veteran's Administration,* 301 F. Supp. 796 (S.D.N.Y. 1969), appeal dismissed as moot 436 F.2d 1363 (2nd Cir. 1971).

Since the Honor and Ethics Code case abstracts are disseminated within the Academy for purposes of training and instruction, their disclosure obviously cannot be thought by the Academy to permit or facilitate the avoidance of the Code's proscriptions. The only danger to Academy functions that could occur would result from a disclosure of confidential information, but that possibility is foreclosed by the deletion process ordered by the Court of Appeals. Since no confidential information will be released, disclosure of the sanitized abstracts, in the words of the Court of Appeals, "poses no such danger to the effective operations of the Codes at the Academy" (Pet. App. A, p. 9A).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

BARRINGTON D. PARKER, JR.
48 Wall Street
New York, New York 10005

MELVIN L. WULF
JOHN H. F. SHATTUCK
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Respondents

July 1975